SHALL THE JURY SYSTEM BE ABOLISHED?

In a recent number of this magazine appeared an article on "Juries and Jurymen." The writer, Judge Pitman, of Massachusetts, took the ground that, while some improvements could be made, the jury system was good in the main, and should be retained. With reference to the improvements suggested, I have nothing to say. Some of them, as, for instance, allowing three-fourths of the jury to find a verdict in civil cases, have been tried in California, and possibly in other States, and have been found to work well enough. But they are subordinate to the main question, and can have but little interest for general readers. I believe the main question—whether the system itself is good—to be worthy of discussion; and as I cannot agree with the learned writer of the article referred to, I will briefly examine the reasons that he adduces in support of the system, and then set forth my objections to it.

His opening argument is, that serving on juries has an educating influence upon the citizen, and, while not going so far as De Tocqueville, he agrees with that writer in the following: "It teaches men to practice equity; every man learns to judge his neighbor as he would himself be judged, . . . and this is the soundest preparation for free institutions." I doubt whether this is practically true. But let us assume that it is true. The answer is, that to teach men equity, or to be good citizens, is not the purpose of the jury system. Its purpose is to assist in the administration of justice; and if it does not do that, it is manifestly a failure. Any educating influence that it may have is wholly incidental and collateral. If it fails in its purpose, it is no argument for its continuance that it has some incidental effect that is beneficial. As well might it be said in defense of a legislature that passed nothing but bad laws, that its sessions afforded splendid practice for the members, and that, if they should only

be reëlected a sufficient number of times, they would develop into a body of Solons who would do honor to the country.

He next says: "The common law itself has grown up alongside of, and has been established in its principles with a reference to, trial by jury; so that the latter has become a congruous part of the former. Certain elementary rules of law are so closely associated with this system of procedure that change in one would require alteration in the other." The inference evidently intended is, that any such change would be bad. But it is not perceived how a change would be required. The learned writer has not mentioned any rule of substantive law which, so far as I can see, would be changed by the abolition of the jury system. He gives but two illustrations of the change he apprehends, viz., the rule that in criminal prosecutions the jury are to give the accused the benefit of a reasonable doubt, and the rule that in actions for negligence they are to ascertain what was "such care as men of ordinary prudence and capacity would take under like circumstances in the conduct and management of their own affairs." But how are these rules different when applied by a judge from what they are when applied by a jury? The rules of law are the same in each case, and would be laid down in precisely the same language by courts and text-book writers. Is it not apparent that the only difference is in the instruments through which they are applied? In one sense it may be said that the reasonable doubt of twelve men is a different thing from the reasonable doubt of one man; but in precisely the same sense it may be said that the reasonable doubt of one jury is a different thing from that of another jury. Surely the learned writer would not say that the law is changed every time a case goes before a different jury! What he evidently means is, that the rules mentioned would be better applied by a jury than by a judge. But this is assuming the question at issue.

No other instances than the two referred to are given by Judge Pitman, and it is therefore difficult to appreciate the nature of the change he apprehends; and until the nature of any particular change is known, it cannot be determined whether such change is desirable or not. Several of the rules of the common law itself were simply barbarous. Equity jurisprudence is nothing but the body of rules devised by enlightened chancellors during several centuries, for the purpose of evading the harsh

and rigid rules of the common law, and for the protection of rights not recognized by it And the greater part of what is good in modern legislation upon legal questions is the incorporation into the laws of the principles wrought out by courts of equity. It can hardly be affirmed that this process is finished, or that perfection has been attained. It is certainly not true that no change whatever would be undesirable.

The next position is this: "One of the serious consequences of compelling the court to try all questions of fact as well as of law, is the danger of thus impairing the confidence of litigants in its impartiality. All understand that the judge does not make, but declares, the law, and so has no room for choice or personal bias. But, in deciding facts, he must necessarily judge and weigh parties and witnesses; and as the most ignorant think they can decide readily as to the facts, while they know nothing of law, they assume to revise the judgment of the court; and what seems to them patent error they are apt to attribute to latent prejudice." It is to be observed here that it is not charged that the judge would in fact be swayed by prejudice, or decide incorrectly, but that ignorant persons would be apt to think he did, and so lose confidence in him. But the same thing may be said of the present condition of affairs. It is not entirely true that a judge decides questions of law only. He has in almost every action to decide questions that are governed by no fixed rules, but are said to be addressed to his "discretion"; and the exercise of this discretion furnishes as much room for personal bias as the decision of an issue of fact could, and so gives rise to the same danger of distrust and loss of confidence.

But, aside from the foregoing, I do not think experience bears out the assertion that ignorant persons, although criticising decisions of fact, abstain from questioning decisions as to the law. It seems to me that they criticise the one quite as much as the other. With the mass of mankind, ignorance is not a reason for refraining from distrust or criticism. So far from it, the less the average man understands about a thing, the more apt he is to distrust it, and the most ignorant are the most prone to criticise and denounce. Fools rush in where angels fear to tread. If we were to shape our action so as to avoid the distrust of such people, we should be like the man in the fable, who began by riding his ass; then, in order to meet the views of the passers-by, let his son ride; then got on with the boy, and finally carried the ass himself.

"Another serious objection to the proposed change would be the additional labor imposed on the judiciary." This objection is probably confined to the individuals who at present constitute that class. The problem, however, is to find out what is most beneficial to the whole community, and not what is most conducive to the comfort of a small fraction of it. If a sacrifice is necessary, some victim will probably be found in the adjacent bushes.

The main thought of the writer of the article referred to is, that facts could not be as well decided by a judge as by a jury. This is not asserted in terms as a universal proposition; it is asserted only with reference to one of the classes of actions mentioned by the writer; but it is implied throughout the article in question, and is plainly what the writer means. And it is evident that if judges can decide the facts as well as juries can, the existence of the latter is without justification; a simple and inexpensive machinery being preferable to a complicated and expensive one, if the work turned out by them be the same. Is there any reason, *à priori*, why a judge cannot decide the facts as well as a body of men taken at random from the community? He is a man as they are. In modern times at least, he is no recluse, but is as much a man of the world as is the average juryman; and he has the advantage of having a trained mind. There can be no advantage in mere numbers, for the "average intelligence" of a jury cannot rise higher than the intelligence of the best of them, which is usually much below that of the judge. But it is not ordinarily profitable to resort to *à priori* reasoning, when experience can be appealed to; and we have the advantage of experience in this case. In equity a judge always decides the facts. In exceptional cases, it is true, a chancellor takes the opinion of a jury as to the facts of a case; but even in such cases the opinion of the jury is not binding, but is merely advisory; and the judge must ultimately pass upon the facts himself. It may be asserted, therefore, that in equity the judges always decide the facts; and this is true not only of the judge who hears the case in the first instance, but also (unless where changed by statute) of the judges on appeal. They have been doing this in England for several centuries, and for the last century in many of the American States. The experience has therefore been sufficiently extensive, and it has demonstrated that judges can decide facts at least as well, and, as many think, a great deal better than juries. Any competent chan-

cery practitioner would smile if asked whether experience showed that chancellors could not decide facts as well as juries can.

So much for the reasons adduced in favor of the jury system. Let us now see what can be urged against it. In the foregoing paragraph the experience of courts of equity was appealed to in order to show that judges could decide facts at least as well as juries. If this be true, it would seem to follow that the more expensive and cumbrous machinery should be done away with. The jury system is expensive. In California the fee is two dollars a day to each juror in civil cases, making an expense of twenty-four dollars a day. When it is remembered that many trials are very long, this is a cruel charge upon the losing party. I am not familiar with the charges in other States, but a much more moderate fee amounts to a considerable sum at the end of a long trial. The system is also complicated. The jurors do not know the law; they have to be instructed therein by the judge, and after hearing their lecture, they are supposed to be quite able to apply the principles laid down to the facts of the case as determined by themselves. It would be surprising if an untrained man hearing a lecture once upon a new subject should be able to seize upon the rules, exceptions, and qualifications stated therein, so as to be able to apply them correctly. I believe that juries do not succeed in doing so once in a hundred times. Cases where they render both a special and a general verdict furnish frequent examples of this; and if any judge will take pains to talk familiarly with jurors after a trial, as to the grounds of their decision, as the writer has frequently done, he will often be amazed at their crude notions of what has been told them. A judge cannot, of course, act upon information received from jurors as to the grounds of their verdict; and where there is any conflict in the testimony it can never be known, in a legal sense, whether the jury reached their conclusion through an erroneous impression of the law, or a certain view of the evidence. It must therefore be presumed on appeal that they fully understood and correctly applied the law given them by the judge; and although they may not have understood it at all, an error in the charge is ground for setting aside the verdict. The machinery, therefore, of jury trials is both expensive and complicated, and even if trials by the judge without a jury turned out no better work, the change must be beneficial.

But the jury system also entails frequent miscarriages of justice, permitting thousands of notorious criminals to escape, and disposing of important rights of property not according to law, but in accordance with the prejudice and sympathies of comparatively ignorant men, thus depriving the law of what should be one of its most prominent characteristics, namely, certainty. Every one who has had experience with juries, or has observed the results of their work, must know that such is the fact. Instances of note will readily occur; for example, the Dukes-Nutt cases in Pennsylvania, the Cash-Shannon case in South Carolina, the Elliott-Buford case in Kentucky, the Star-Route case in Washington, and the Bender case in Ohio, which last was the occasion of the Cincinnati riot. Every county in every State in the Union can furnish examples, and the verdict of a jury has become almost a synonym for uncertainty.

But it will be objected that the institution has been handed down to us through many generations, and that if it works so badly it surely would not have survived. It is true that the institution is of great antiquity, and that this raises a presumption in its favor; but like many another thing it has long survived its usefulness. Men are prone to reverence the customs of their fathers, and frequently cling to mere forms after the substance has gone; and this is not wholly without justification. Let us, therefore, in deference to the antiquity of the system, inquire why it is that it has existed so long and become so endeared to the Anglo-Saxon heart. The answer is, I think, that it once was suited to the times and was productive of good results; but the times have changed, and it is no longer so. What endeared it to the English people was its independence, its resistance to the oppression of the Government and the upper classes. Government was strong in those days, and carried out its measures with a heavy hand; and the upper classes inherited a large portion of the power and prestige of their feudal ancestors. It was very natural that an institution that withstood oppression should become dear to the oppressed, and this more than atoned for its imperfections. But a great change has come over society. The upper classes have been effaced for all practical purposes. The powers of the Government have been limited, and, so far as its control over the citizen is concerned, it is not even strong enough to have an inflexible administration

of its own laws. It is no longer a function of juries, therefore, to resist oppression.

In addition to this, the spirit of the age has changed. Men are no longer of that stern stuff which exacted an eye for an eye and a tooth for a tooth. Sentiment, benevolence, and philanthrophy have become potent forces. Conscientious scruples against capital punishment are common, and numbers of men shrink from the idea of having blood on their hands, even in a legal way; some would no more condemn a man to death than they would carry the sentence into execution. These feelings are easily appealed to by an adroit advocate, and the results are deplorable. In about half the cases crime goes unpunished, or is punished in a very inadequate degree. The result is, that bad men are not deterred from crime; it is an even chance whether they will be punished at all, and they prefer to take that chance rather than restrain the passions of the moment. And men who are not bad take the law into their own hands; they feel that the law will not protect them, and they seek to protect themselves. These causes lead to that frequency of homicide which is the great stain of American civilization.

With reference to civil cases, the cause last mentioned does not, as a matter of course, apply. The main reason of the bad results of jury trials in civil cases is that the questions arising in modern trials are usually too complex for untrained minds. In Lord Ellenborough's time, a trial was ordinarily an affair of an hour or so. In our time, it is ordinarily an affair of several days, frequently of several weeks, and not seldom of several months. The average juryman cannot hold the case in his head, and the result is that he gives his verdict in accordance with his sympathies or prejudices. The fatal objection to a jury is its ignorance. Where the citizen is left to himself, he does not usually prefer to seek the aid of ignorance to guide him in the affairs of life. If his health is affected, he goes to a physician; if his property is assailed, he goes to an attorney. He hies him to the butcher for meat, and to the baker for bread, and so on with reference to his other affairs; but the law, however difficult and delicate may be the occasion, employs its agents without reference to knowledge or other qualification. In this way a cobbler may be called upon to decide a question of commercial usage; a blacksmith, a question as to the proper degree of skill in repairing a watch; a saloon-keeper, a question as to the

value of a slandered character; an old-clothes man, a question as to the proper degree of skill in running a railway; and so on *ad infinitum.*

For the foregoing reasons, it is believed that it would be a great reform to abolish the jury system, and allow the judge to pass upon the facts as well as the law. It is true that he might be called upon to decide questions of which he had no previous knowledge; but it is to be remembered that, after deciding such a case, he is not dismissed, as a juryman is, but can carry the fruits of the investigation to the next case of the kind. He could not hold office very long without becoming experienced as to the questions that most frequently arise, and the advantage of a trained mind and skill and experience in weighing evidence is incalculable. Whether this reform will come in our time, *quære?*

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